No. 98-1307

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Supreme Court of the United States

OCTOBER TERM, 1998

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
PETITIONERS,

v.

ILLINOIS COUNCIL ON LONG TERM CARE, INC.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

REPLY BRIEF FOR CROSS-PETITIONER

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TABLE OF CONTENTS

Table of Authorities ii

Reply Brief for Cross-Petitioner 1

I. The Vagueness of the "Grid" Is an Important and Far-Reaching Issue 1

II. The Jurisdictional and Ripeness Issues Are Interrelated 2

III. The Vagueness Challenge Is Ripe Under *Abbott Laboratories* 3

IV. The Council's Vagueness Challenge Need Not Be Pursued in Individual Enforcement Proceedings 6

Conclusion 9

TABLE OF AUTHORITIES

CASES

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 3, 4, 5

Gardner v. Toilet Goods Association,
387 U.S. 167 (1967) 4, 5

Lujan v. National Wildlife Federation,
497 U.S. 871 (1990) 5, 6, 7

McNary v. Haitian Refugee Center,
498 U.S. 479 (1991) 2, 6, 8

Reno v. Catholic Social Services, Inc.,
509 U.S. 43 (1993) 2, 3, 5, 8

Texas v. United States, 118 S. Ct. 1257 (1998) 6

Toilet Goods Association v. Gardner,
387 U.S. 158 (1967) 6

United States v. Mazurie, 419 U.S. 544 (1975) 3

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 1

STATUTES AND REGULATIONS

42 C.F.R. § 488.408(g)(2) 1

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I. The Vagueness of the "Grid" Is an Important and Far-Reaching Issue.

The Secretary admits that all nursing homes participating in Medicare and Medicaid are surveyed without prior notice about once a year. Br. in Opp. 3-4. The Secretary does not dispute that inspectors use the "grid" (*see* Cross-Pet. App. A-1) to determine enforcement remedies. It is undisputed that six out of the seven "scope and severity factors" on the grid are undefined. Surveyors have the discretion to plot a violation in virtually any box they wish, thereby instigating remedies on a subjective basis. The Secretary does not dispute that a facility cannot appeal the choice of remedy or the scope and severity designations. 42 C.F.R. § 488.408(g)(2). The Secretary fails to answer to the assertion that no body of administrative law is emerging that clarifies the meaning or application of the scope and

severity factors. Cross-Pet. 5. The nursing home industry is being subjected to a vague and arbitrary enforcement system that will not "correct itself" over time. The vagueness of the grid is thus an important issue.

The procedural question of the ripeness of the Council's claims should be equally important to this Court. The question of whether a facial constitutional challenge to regulations can be ripe even though unrelated to an individual claim is a close and significant issue. The Secretary does not dispute that this Court's analysis of the ripeness of the Council's claims will have broad precedential value for constitutional and statutory challenges under federal programs. *See* Cross-Pet. 6.

II. The Jurisdictional and Ripeness Issues Are Interrelated.

The Secretary argues that the jurisdictional and ripeness issues are dissimilar. Br. in Opp. 16. However, both issues have a common denominator - whether an adequate administrative review mechanism exists for the claims at issue. The Secretary does not dispute that the Council's constitutional and statutory challenges cannot be raised in the administrative review process. Under *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496-97 (1991), that is a major reason why jurisdiction exists. Under *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 63-64 (1993), that is a major reason why the vagueness challenge is ripe. In short, if the Seventh Circuit was correct regarding jurisdiction, it was incorrect regarding ripeness. If this Court affirms the Seventh Circuit regarding jurisdiction, just resolution of this case requires reversal of the Seventh Circuit's ripeness holding. Otherwise, substantial constitutional violations will go uncorrected. The Council's members will continue to be deprived of fair enforcement of the regulations and fair notice of the deficiencies for

which they may be penalized, in violation of their due process rights under the Fifth and Fourteenth Amendments. Am. Compl. § 88.

This Court in *Catholic Social Services,* 509 U.S. at 60, recognized the relationship between jurisdiction and ripeness. Cross-Pet. 7. The Secretary does not challenge this Court's conclusion that jurisdiction and the ripeness doctrine "dovetail neatly." *Catholic Social Services,* 509 U.S. at 60. Moreover, the Secretary's attempt to distinguish *Catholic Social Services* is unsuccessful. Br. in Opp. 16-17. The Secretary admits that in *Catholic Social Services* "withholding review would leave such an alien without any means for obtaining judicial review (making the hardship of withholding review severe)." Br. in Opp. 17. The same rationale applies here because the Council's claims cannot be heard in the administrative review process. Cross-Pet. 7-8. This Court should consider both jurisdiction and ripeness just as it has in the past. Cross-Pet. 8 (citing cases).

III. The Vagueness Challenge Is Ripe Under *Abbott Laboratories.*

The Secretary agrees that resolving the ripeness issue requires "an application of the criteria this Court articulated in [*Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)]" (Br. in Opp. 11), something the Seventh Circuit failed to do. *See* Pet. App. 10a. In purporting to apply the *Abbott Laboratories* factors, however, the Secretary cites cases that do not even consider ripeness. Br. in Opp. 10 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *United States v. Mazurie,* 419 U.S. 544, 550 (1975)). Neither of those cases addressed ripeness, and both involved appeals after rulings on the merits, unlike here. The language the Secretary quotes pertains to analyzing the merits of a vagueness challenge, not ripeness or the pleading requirements to survive a mo-

tion to dismiss. The Council's complaint adequately states a claim and the *Abbott Laboratories* factors are satisfied. Cross-Pet. 8-10; *Gardner v. Toilet Goods Ass'n.*, 387 U.S. 158 (1967) (case arose on a motion to dismiss and Court concluded that pre-enforcement challenge was ripe after employing *Abbott Laboratories* factors).

The Secretary now appears to have abandoned much of the Seventh Circuit's rationale for its ripeness holding. The Seventh Circuit said the Council "cannot ask for an all-at-once review but must wait until the agency has worked through the process of adding detail in administrative adjudication." Pet. App. 11a. However, the assumption that standards will get clearer over time through administrative decisions does not apply here. A provider cannot challenge the choice of the remedy or the scope and severity designations in an administrative hearing. Published decisions of administrative law judges do not discuss scope and severity factors or the appropriateness of a particular remedy. Cross-Pet. 12. Thus, no body of administrative law is evolving that clarifies the meaning or application of the scope and severity factors. *Id.* The Secretary does not dispute this. The Secretary merely contends that "an administrative record will demonstrate how the Secretary or state enforcement officials are tailoring enforcement to the particular facts of the case, and may well document the enforcement agency's reasons or justifications for imposing the chosen sanction or corrective action, significantly aiding judicial review." Br. in Opp. 15. The Secretary misses the point. No body of *administrative decisions* is emerging that clarifies the meaning or application of the scope and severity factors, because such challenges cannot be asserted in the administrative review process. Hence, the Seventh Circuit's justification for its ripeness holding does not exist.

The Secretary claims there is no hardship to withholding judicial review. Br. in Opp. 11. But the Secretary has no answer for the assertion that the only way to preserve appeal rights in the administrative review process is to refuse to correct the deficiency and risk termination of one's provider agreement. Cross-Pet. 11. Termination of one's provider agreement can mean going out of business for nursing homes with a high percentage of revenues represented by Medicare. The Secretary tacitly concedes that there is no way to challenge the vagueness of the grid in the administrative review process. Futile exhaustion is burdensome. Under the *Abbott Laboratories* test, the Council's vagueness claim is ripe. The Seventh Circuit's ruling is contrary to *Abbott Laboratories,* 387 U.S. 136; *Gardner v. Toilet Goods,* 387 U.S. 167; and *Catholic Social Services,* 509 U.S. 43.

The Secretary relies heavily on *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 891 (1990). Br. in Opp. 11, 12, 14 (quoting *Lujan*). However, the language the Secretary quotes is *dicta,* and *Lujan* is distinguishable. In *Lujan,* the National Wildlife Federation ("Federation") sued the BLM and other federal parties alleging violations of various federal statutes in administering the BLM's "land withdrawal review program." Several members of the Federation filed supporting affidavits. But this Court held that the affidavits were insufficient to confer *standing* on the Federation to challenge the government's actions under the program. 497 U.S. at 882-89. After concluding that the Federation lacked standing, the opinion nevertheless includes at pp. 890-94 a "hypothetical inquiry" and "long and abstract discussion of the scope of relief that might have been awarded had the Federation made a sufficient showing of injury. . . ." 497 U.S. at 913 (Blackmun, J. dissenting). The Secretary relies repeatedly on that "hypothetical inquiry" and discussion regarding ripeness here. Br. in Opp. 11, 12, 14. However,

as discussed below, other language from *Lujan's* ripeness discussion *supports* the Council's ripeness assertions.

Lujan also is distinguishable. Unlike here, *Lujan* arose at the summary judgment stage. The Federation's claims also were much broader than the Council's claims here. The Federation asserted an amorphous challenge to the "entirety" of the "land withdrawal review program." 497 U.S. at 890. That program encompassed "1250 or so individual classification terminations and withdrawal revocations." *Id.* The Council's vagueness challenge is much more focused and precise than that in *Lujan.*

The Secretary argues that "[u]ncertainty as to the remedies that will be used to ensure compliance with the lawful substantive standards, however, is not the sort of undue hardship that warrants pre-enforcement review." Br. in Opp. 13 (citing *cf. Texas v. United States*, 118 S. Ct. 1257, 1259-60 (1998) and *Toilet Goods Ass'n. v. Gardner,* 387 U.S. 158,163-64 (1967)). The cited cases do not support the Secretary's argument. Neither case involved regulations that had already been enforced. Neither case involved "uncertainty as to remedies." Unlike here, they involved uncertainty as to whether the regulations would be enforced at all. *Texas,* 118 S. Ct. at 1260 ("Texas has not pointed to any particular school district in which the application of §§ 39.13(a)(7) or (8) is currently foreseen or even likely."); *Toilet Goods,* 387 U.S. at 163 ("At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order.")

IV. The Council's Vagueness Challenge Need Not Be Pursued in Individual Enforcement Proceedings.

The Secretary contends that the Council cannot provide prove vagueness by providing multiple examples of how

the regulations have been randomly applied against its members, and that only individual claims may be brought. Br. in Opp. 15 (quoting *Lujan*, 497 U.S. at 892-93). However, *Lujan* expressly recognized that regulations with "across the board" applicability can be challenged:

> We merely assert that [the "land withdrawal program"] is not an identifiable "final agency action" for purposes of the APA. *If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review in the manner we discuss subsequently in text, it can of course be challenged under the APA by a person adversely affected - and the entire "land withdrawal review program," insofar as the content of that particular action is concerned, would thereby be affected.* But that is quite different from permitting a generic challenge to all aspects of the "land withdrawal review program," as though that itself constituted a final agency action.

497 U.S. at 890-91, n.2 (emphasis added). The highlighted language describes this case. The Secretary's refusal to define six out of the seven scope and severity factors constitutes "final agency action."

The Secretary fails to offer a legitimate reason why a regulatory challenge like this cannot be brought in a representational setting. As the Seventh Circuit stated, "[i]f some nursing homes may litigate on their own, they may litigate through their trade association; we don't see why the fact that other members of the Council have potential Medicare claims should cut off associational representation

and compel independent litigation." Pet. App. 8a. To establish vagueness, the Council can provide *at trial* multiple examples of how the enforcement regulations have been arbitrarily applied. Such evidence would be irrelevant and would not be allowed in an individual administrative appeal because the vagueness of the regulations cannot be challenged in the administrative review process. This case is thus similar to the "pattern and practice" claim in *McNary*, 498 U.S. at 497 ("To establish the unfairness of the INS practices, respondents in this case adduced a substantial amount of evidence, most of which would have been irrelevant in the processing of a particular individual application.").

In the district court, the Council provided affidavits from some of its members setting forth specific applications of the regulations in support of its motion for preliminary injunction. However, the district court never reached the Council's motion for preliminary injunction, but instead granted the Secretary's motion to dismiss. Cross-Pet. 2; Pet. App. 21a. Accordingly, the question on appeal was whether the Council's amended complaint adequately stated a claim. Under the "notice pleading" standards for federal court, the amended complaint was sufficient; the Council did not need to prove its case in the complaint. By affirming the dismissal of the vagueness challenge, the Seventh Circuit effectively required the Council to meet a "heightened pleading standard." Cross-Pet. 12-13. At a minimum, the Seventh Circuit should have remanded the matter and granted the Council leave to amend. *Catholic Social Services*, 509 U.S. at 66-67.

CONCLUSION

For the foregoing reasons, and those set forth in the cross-petition, the conditional cross-petition should be granted and the dismissal of the Council's challenge to the vagueness of the regulations should be reversed.

Respectfully Submitted,

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